

² The Board notes that, following the March 15, 2012 nonmerit decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. See 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

FACTUAL HISTORY

On September 29, 2011 appellant, then a 60-year-old program support clerk, filed a claim of traumatic injury, alleging that on September 27, 2011 she hit her right knee and leg at work while trying to stop two residents from fighting.

In support of her claim, appellant submitted several witness statements and a health unit record dated September 28, 2011, prepared by a nurse practitioner. This record noted her history of injury and assessed her condition as a right knee sprain.

By letter dated November 15, 2011, OWCP advised appellant of the deficiencies of her claim, including the fact that nurses are not physicians under FECA and are not competent to render a medical opinion and gave her the opportunity to submit medical evidence to support her claim. No additional evidence was received.

In a December 20, 2011 decision, OWCP denied appellant's claim on the grounds that the medical component of the fact of injury element was not established. It stated that the medical evidence submitted did not establish a diagnosed condition caused by the accepted injury signed by a physician.

On January 18, 2012 appellant submitted a magnetic resonance imaging (MRI) scan report of her right knee, dated November 9, 2011, from Dr. Tai M. Tran, a Board-certified diagnostic radiologist. The report found moderate thinning of the medial meniscus posterior root attachment with possible horizontal tear of the posterior horn and body and also diagnosed appellant with severe patellofemoral osteoarthritis.

Appellant filed a request for reconsideration on February 29, 2012.

In a March 15, 2012 decision, OWCP denied reconsideration on the grounds that appellant's request did not raise a substantive legal question or include new and relevant evidence to warrant a merit review.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,³ OWCP's regulations provide that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴ To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ When a claimant fails to meet one of the above standards, OWCP

³ 5 U.S.C. §§ 8101-8193.

⁴ 20 C.F.R. § 10.606(b)(3). See *J.M.*, Docket No. 09-218 (issued July 24, 2009); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁵ 20 C.F.R. § 10.607(a). See *S.J.*, Docket No. 08-2048 (issued July 9, 2009); *Robert G. Burns*, 57 ECAB 657 (2006).

will deny the application for reconsideration without reopening the case for review on the merits.⁶

ANALYSIS

On September 29, 2011 appellant filed a claim for traumatic injury, which OWCP denied by decision dated December 20, 2011. OWCP found that she had not submitted medical evidence which diagnosed a medical condition causally related to the accepted incident. Appellant requested reconsideration on February 29, 2012 and submitted the November 9, 2011 MRI scan report from Dr. Tran. The Board finds that OWCP improperly denied merit review of the claim.

With appellant's request for reconsideration, OWCP received a November 9, 2011 MRI scan report signed by Dr. Tran which reported a moderate thinning of the medial meniscus posterior root attachment with possible horizontal tear of the posterior horn and body, as well as a diagnosis of severe patellofemoral osteoarthritis. Dr. Tran offered a diagnosis of appellant's condition that was previously unsupported by other medical evidence. The Board finds that his November 9, 2011 report constituted relevant and pertinent new evidence not previously considered. Therefore, OWCP improperly refused to reopen appellant's case for further review of the merits.

To obtain merit review, appellant is not required to submit evidence sufficient to establish her claim. She need only provide relevant and pertinent new evidence not previously considered by OWCP.⁷ Dr. Tran's report meets this requirement. The case will be remanded for a decision on the merits of appellant's claim.

CONCLUSION

The Board finds that OWCP improperly refused to reopen appellant's claim for further review of the merits under 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.608(b). *See Y.S.*, Docket No. 08-440 (issued March 16, 2009); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

⁷ *F.D.*, 58 ECAB 413 (2007); *Billy B. Scoles*, 57 ECAB 258 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 15, 2012 is set aside and the case remanded for further proceedings consistent with the above opinion.

Issued: May 22, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board